88-498

Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1987

NICODEMO SCARFO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Does the use of an anonymous jury unnecessarily create an atmosphere of prejudice and fear and thus deprive Defendant of his Constitutional right of a fair trial?

II.

Can testimony of other crimes be permitted with such frightening imagery and detail as to make it impossible for a jury to analyze the crucial issues dispassionately?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

Plaintiff-Appellee:
United States of America

Defendant-Appellant:
Nicodemo Scarfo

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Nicodemo Scarfo respectfully prays that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit to review the opinion and order entered in this proceeding on June 29, 1988.

The opinion is reported at 850 F.2d 1015 (3d.Cir.1988) and is attached as App. A.

Petition for Rehearing was denied on July 25, 1988. App. B.

The Memorandum and the Order of the trial Judge denying motion for new trial was entered July 27, 1987. It is not reported. App. C.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and order of the Court of Appeals was entered on June 29, 1988.

The petition for rehearing was entered on July 25, 1988.

Jurisdiction to review the Opinion and Order by Petition for Writ of Certiorari is conferred on this Court by the provisions of Title 28, United States Code, Section 1254(1).

This case presents an important question of Federal law which has not been, but should be decided by this Court.

The opinion also reflects conflict within the Circuits.

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Military, when in actual service

in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18 United States Code, Section 2, is as follows:

Section 2, Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 United States Code, Section 1951 (b)(2), states in part:

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Rule 105, Federal Rules of Evidence:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 403, Federal Rules of Evidence

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 (b), Federal Rules of Evidence:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On January 5, 1987, Petitioner was charged by superseding indictment in the United States District Court, Eastern District of Pennsylvania with conspiracy to extort money under color of official right, a violation of Title 18, U.S.C. Section 1951 (b)(2) and aiding and abetting in that extortion, a violation of Title 18 U.S.C. Section 2.

References to murder, loan sharking and gambling were included in the indictment.

Petitioner filed his Motion in Limine to exclude certain evidence relating to other crimes under the provisions of R.403, Federal Rules of Evidence.

The trial Court denied the Motion without prejudice pretrial, and again denied the Motion after jury selection.

The Court granted the Government's Motion to impanel an anonymous and sequestered jury over Petitioner's objection.

At the beginning and the end of the trial, the Court addressed the jury and gave his comments regarding the anonymous jury.

Jury trial began April 28, 1987 and ended May 6, 1987.

Petitioner was found guilty on May 6, 1987 of conspiracy to commit extortion and aiding and abetting in that attempt at extortion.

Motion for new trial was filed on May 15, 1987 to which the government responded on May 19, 1987.

On July 27, 1987, the Court entered its Memorandum and Order Denying Defendant's Motion.

On August 5, 1987, Petitioner was sentenced to serve a term of imprisonment of 14 years on counts 1 and 7 to run concurrently. He was also ordered to pay a fine of $150,000.00.

On August 8, 1987, a Notice of Appeal was timely filed.

On June 29, 1988, the Court of Appeals for the Third Circuit entered its opinion, and affirmed the conviction.

II. FACTUAL HISTORY

In the superceding indictment, Nicodemo Scarfo was charged with conspiracy to extort and aiding and abetting in that extortion. Also named in the indictment as co-defendants were Leland Beloff and Robert Rego.

The trial of Beloff, a member of the City Council of Philadelphia and Robert Rego, his legislative assistant, were severed from the trial of Nicodemo Scarfo.

The Rouse Company was engaged in a major waterfront development in the city of Philadelphia. Funding for the project from private, federal, and banking sources required that certain legislation (bills 990 and 991) be approved no later than June 19, 1986 by the Philadelphia City Council.

The project was located in the Councilmanic district of Councilman Leland Beloff.

In the city of Philadelphia, if a proposed ordinance affected a particular district, only the councilman from that district could introduce the legislation.

The extortion plan was to demand one million dollars from the Rouse Company to obtain Beloff's cooperation in the passage of Bills 990 and 991.

To effectuate the plan, one Nicholas Caramandi met with, and made the demand on, a representative of the Rouse Company. Caramandi, apparently acting for Beloff and Rego, held himself out as a member of organized crime.

The immediate notification by Rouse officials to the FBI resulted ultimately in the abortion of the scheme and the arrest of Beloff, Rego and Scarfo.

Petitioner, according to Caramandi, was the head of organized crime in the area and the scheme could only have been completed with his approval.

The only direct evidence of Petitioner's involvement was his awareness of the crime after its organization and his control of the division of the monies to be received.[1]

The Government's chief witness, Nicholas Caramandi, testified at length as to many other crimes he had commited in the past. He testified as to the murder of Pasquale Spirito and other attempted murders.

He testified in detail about a formal ceremony of initiation into La Cosa Nostra ("LCN"). He testified as to mob violence, extortion, loan sharking and thus painted a picture to the jury of Petitioner as an evil, vicious, shrewd and terrifying type of person who was the boss of known criminals.

A second witness, Thomas Del Giorno basically testified to the same facts.

In closing argument, the Prosecutor stated,

> " 'Nick' Scarfo is a shrewd, clever and dangerous man. He rules his criminal army with a deadly iron fist. He keeps his soldiers in mortal fear. It is that fear that is Scarfo's undoing. There were no appeals from 'Nicky' Scarfo's court. Judgment was swift and

[1]Beloff and Rego were tried twice. In the first trial, the jury could not reach a verdict and a mistrial was declared. In the second trial they were found guilty.

terminal. These are violent, greedy men who stop at nothing that stood between them and a dirty buck, the dirty bucks that maintain them in their limousines and their Florida homes and their perpetual suntans. Take the cover off this bag of spiders and expose them for what they are. This is no fantasy; this is your worst nightmare. End the nightmare on South Street. Convict 'Nicky' Scarfo."

Thus, the trial of a nonviolent, economic, extortion charge was transformed into a trial of organized crime.

In his discussion to the jury, when he informed them, that they would remain anonymous, the trial judge stated inter alia, that:

". . .We want to make sure that you are able to reach your verdict in this case without having to concern yourselves about the possibility of any harm or other improper influence on yourself or members of your family."

"But we all watch television, we all read the newspapers, we see the Godfather movies. We know the atmosphere which is sometimes portrayed on television and in movies and newspapers. And I wanted to make sure that no member of the jury should worry about it, even though it is my personal strong belief that there would never have been any basis for any worry or concern even if you accept the government's evidence as correct."

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

QUESTION I

DOES THE USE OF AN ANONYMOUS JURY UNNECESSARILY CREATE AN ATMOSPHERE OF PREJUDICE AND FEAR AND THUS DEPRIVE DEFENDANT OF HIS CONSTITUTIONAL RIGHT OF A FAIR TRIAL?

In *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819 (1984) this court reviewed an order of a trial judge closing all but 3 days of a six week voir dire to the press and public. The case involved a highly sensitive factual situation, a rape and murder of a teen-age girl. The closure had been ordered as an attempt to protect the privacy rights of the jurors.

This Court reversed and wrote:

> " 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' *Richmond Newspapers, supra*, 448 U.S. at 572, 100 S.Ct., at 2824. Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.
>
> * * *
>
> Thus not only was there a failure to articulate findings with the requisite specificity but there was a failure to consider alternatives to closure and to total suppression of the transcript. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected."

No attempt was made by the trial judge or discussed in the opinion of the Third Circuit Court of Appeals concerning less intrusive techniques of closure.

As reflected in the Opinion of the Third Circuit Court of Appeals, in this case, the practice of impaneling anonymous juries is no longer rare. (see *United States v. Barnes*, 604 F.2d 121 (2d Cir) (1979); *cert.den*, 446 U.S. 907, 100 S.Ct. 1833 (1980); *United States v. Ruggiero*, 846 F.2d 117 (2d Cir) (1988); *United States v. Persico*, 832 F.2d 705 (2d Cir) (1987); *cert.den*, ____ U.S. ____. 108 S.Ct. 1995; *Hayden v. United States*, 814 F.2d, 888 (2d Cir) 1987; *United States v. Rosado*, 728, F.2d 89, (2d Cir) 1984; *United States v. Thomas*, 757, 1359 (2d Cir) *cert.den*, 474 U.S. 819, 106 S. Ct. 66 (1985); *Johnson v. United States*, 270 F.2d, 721 (9th Cir) (1959) *cert.den*, 362 U.S. 937, 80 S.Ct. 759.[2]

After Petitioner's conviction, another anonymous jury was requested in the United States District Court for the Eastern District of Pennsylvania in *United States v. Traitz, Jr., et al.*, Criminal No. 86-00451. On September 15, 1987, Judge Marvin Katz denied the use of an anonymous jury in that case. He said:

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[2]Following the order directing the impanelling of an anonymous jury in the case sub judice, Mr. Scarfo faced a jury in two additional trials; *United States v. Nicodemo Scarfo et al*, Case: 87-258, presided by the Honorable Thomas N. O'Neill, Jr.; *Commonwealth of Pennsylvania v. Nicodemo Scarfo, et al.*, Case No: Ct. 8705-6-2256-2279, presided by the Honorable Albert F. Sabo.

In neither case was an anonymous jury ordered by the Court.

In each case Mr. Scarfo and his co-defendants were found not guilty.

As of this writing an anonymous jury had been requested and granted in *United States v. Scarfo*, Case no. 88-00003, presently being tried in the United States District Court for the Eastern District of Pennsylvania.

"It is hereby ORDERED that after weighing the prejudicial impact of juror anonymity against the need for an anonymous jury, I will not order jury anonymity. See, e.g., *Buchalter v. N.Y.*, 319 U.S. 427 (1943) and *Capone v. U.S.*, 56 F.2d 927 (7th Cir.), *cert. denied*, 268 U.S. 553 (1932) as examples of traditional juries convicting, in appropriate cases, defendants who were more notorious than these. The reasons for anonymity are not demonstrated by the prosecution to be sufficiently strong to outweigh the risks of chilling the presumption of innocence by an induced fear. The jury will be sequestered during its deliberations."

On July 29, 1987, in *United States v. Coonan*, 664 F.Supp. 861 (S.D. N.Y. 1987), District Judge William Knapp denied the request for impanelment of an anonymous jury. He stated that no suggestion was made that any defendant or co-conspirator had attempted to tamper with the jury in cases in which they had been involved in the past, nor was there any suggestion that in any prior case in which defendants had been involved was there any attempt to interfere with the working of the judicial process.

The trial judge in the case at bar recognized the cases in the Second Circuit. He also recognized the reasons given to the jury for their anonymity in the three cases cited. Judge Fullam in this case said:

"In the Second Circuit cases cited above, the appellate court approved a form of instruction which told the jury that their identities were being confidential so that they would not be badgered by representatives of the media. While there is perhaps a grain of truth in that explanation, that plainly is not the true reason for preserving anonymity, and I decline to adopt that

subterfuge. In my view judges must deal honestly with juries or the entire system will break down.

* * *

Stated otherwise, it was and is my firm conviction that the benefits of preserving juror anonymity comes at too high a price if it is deemed necessary to misinform the jury in the process. Moreover, must jurors would undoubtedly see through the transparent subterfuge of invoking media harassment to justify anonymity, would speculate apprehensively about the reasons for the fabrication, and would thus be more likely to draw inferences prejudicial to the defendant than if the real reasons had been given in the first place."

The trial Judge also told the jury that in twenty-seven years on the bench, he had never seen or heard of a case in which any defendant ever tried to cause harm to a juror or the juror's family.

Surely, when he ordered anonymity after that, some speculation had to take place as to whether there was more potential harm in this case then any the judge had seen for twenty-seven years.

The trial judge in his laudable desire to be candid with the jury, inevitably created the disastrous effect of adversely affecting the presumption of innocence.

There is clearly conflict in the Circuit Courts concerning anonymous juries.

1. The Second Circuit has approved instructions advising the jurors that it is being protected from media harassment.

2. The Third Circuit, by affirming the conviction, has tacitly approved the statements of the trial Judge to the jury concerning anonymity.

3. The trial Judge specifically held that using the guidelines of the Second Circuit and concealing the actual reason for anonymity could cause the entire system to break down.

4. The use of an anonymous jury without any discussion was raised by the Third Circuit in *Scarfo, supra.*

Nowhere is there any discussion of the use of less intrusive methods of closure as mentioned in *Press-Enterprise, supra.*

The Courts below did not discuss the possibility of sequestration with stringent conditions limiting contact with non jurors. The Courts below did not discuss the possibility of revelation of the names of the panel outside of the presence of the public and press.

QUESTION II

CAN TESTIMONY OF SUCH CRIMES BE PERMITTED WITH SUCH FRIGHTENING IMAGERY AND DETAIL AS TO MAKE IT IMPOSSIBLE FOR A JURY TO ANALYZE THE CRUCIAL ISSUES DISPASSIONATELY?

This case is directed to the issue not addressed in *Huddleston v. United States,* ___ U.S. ___, 108 S. Ct. 1496 (1988).

At footnote 8, the Court wrote:

"As Petitioner's Counsel conceded at oral argument, Petitioner did not seek review of the Rule 403 Balancing performed by the courts below. Tr. of Oral Arg. 14. We therefore do not address that issue."

In *Huddleston v. United States*, this court held that a preliminary finding by a trial Judge was not necessary before admission of extrinsic acts.

It is only necessary that there be sufficient evidence to support a finding that a Defendant had committed the similar acts.

In discussing the protection against prejudice which might result from the introduction of evidence of similar acts, the Court pointed out the four sources from which that protection emanated:

". . . First, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the *trial court must make* under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, see Advisory Committee's Notes on Fed.Rule Evid. 404(b), 28 U.S.C. App., p. 691; S. Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. See *United States v. Ingraham*," 832 F.2d 229, 235 (CA1 1987). (emphasis added)

The philosophy of Rule 403 of the Federal Rules of Evidence is expressed in *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213 (1948):

"Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S. Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

Some of the language in *Kotteakos v. United States* 328 U.S. 750 66 S. Ct. 1239, 1248, is material to this discussion.

"And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of congress. *Bruno v. United States, supra*, 308 U.S. at page 294,

60 S. Ct. at page 200, but if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Petitioner contends that the balancing test which the trial court must make was not properly made at the trial nor discussed in the opinion of the Court of Appeals.

Viewing the record realistically, one must conclude that the extensive detailed testimony of crimes other than the one with which Petitioner was charged had to create a suspect verdict.

The Memorandum Order of the trial Judge relates almost exclusively to the relevance of the other crimes evidence. The problem of prejudice is mentioned in passing, but the problem of the prejudice created by the testimony was not balanced against the test of relevancy in the opinion of the Court of Appeals.

It is not suggested here that the instructions to the jury concerning other crimes evidence were insufficient, nor is it necessary to contend that the testimony concerning extrinsic acts failed to meet the test of relevancy.

The advisory committee's notes on Federal Rule of Evidence 404(b) states:

"No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other proof and other factors appropriate for making decisions of this kind under Rule 403."

In *Wigmore*, Code of Evidence, 3d ed. 1942, p. 355, the author wrote in an attempt to define "undue prejudice":

"Whenever the admission of a particular class of relevant evidential facts would

1) be likely to stimulate an excessive emotion or to awaken a fixed prejudice as to a particular subject or person involved in the issues,

2) and thus dominate the mind of the tribunal and prevent a rational determination of the truth,

3) and where the evidence having this tendency is not necessary to the asertainment of the truth * * *.

In *Huddleston, supra*, this Court wrote:

Federal rule of Evidence 404(b)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. *Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue*, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." (emphasis added)

It is suggested that this case lends to the establishment of at least one reasonable approach to Rule 403 of the Federal Rules of Evidence when prejudice conflicts with relevancy. It is applicable not only to the case at bar but undoubtedly many cases.

The actual crucial issue in this case, was whether Petitioner was involved in the attempt at extortion of the Rouse Company. A collateral issue was the state of mind of the witnesses Caramandi and Del Giornio. The evidence of other crimes was held to be relevant to prove that state of mind.

But, unless that state of mind was questioned on cross examination, it was not a "disputed issue".

Thus, the bare mention by the witnesses of their fear of Petitioner and of their commission of many crimes, without any detail, would have completely satisfied the findings of the courts below that the disclosure was relevant and necessary.

However, it is contended that frightening details and specifics of the criminal activities created undue prejudice that was not "needed" unless and until a defendant by cross examination makes the issue a disputed one.

This analysis is consistent with the rules concerning character evidence. It is only after a defendant places his character in evidence that the government has the right to place testimony and evidence before the jury disputing the defendant's position.

Testimony concerning other uncharged crimes when relevant and needed, may create inevitable prejudice; detailed description of those crimes creates undue prejudice.

The closing argument of the Prosecutor, discloses that in this case, the Government was trying the man and not the crime. (See pp. 7, 8).

CONCLUSION

The growing number of cases in which anonymous juries are being sought and ordered must necessarily create problems in the lower courts.

Developing unbiased criteria for measuring undue prejudice under Federal Rule of Evidence 403 would be of assistance in securing more uniformity in the application of that rule in the trial courts.

It is respectfully urged that this Court issue its Writ of Certiorari so that the record in this case may be fully reviewed.

Respectfully submitted,

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Dated: September 20, 1988

Appendix

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APPENDIX A

UNITED STATES of America

v.

Nicodemo SCARFO a/k/a "The Little Guy,"

Appellant.

No. 87-1490.

United States Court of Appeals, Third Circuit.

Argued March 7, 1988.

Decided June 29, 1988.

Rehearing and Rehearing In Banc
Decided July 25, 1988.

Defendant, alleged "boss" of organized crime family, was convicted by jury in the United States District Court for the Eastern District of Pennsylvania, John P. Fullom, Chief Judge, of conspiracy and extortion in violation of Hobbs Act, and he appealed. The Court of Appeals, Weis, Circuit Judge, held that: (1) evidence of defendant's participation in various murders unrelated to extortion scheme was admissible to establish credibility of Government's disreputable yet indispensable witnesses; (2) trial court's decision to empanel anonymous jury did not deprive defendant of information reasonably necessary to intelligent exercise of peremptory challenges; and (3) trial court's explanation to jury of use of anonymous jury procedure did not infringe on presumption of innocence.

Affirmed.

1. **Criminal Law —369.2(1)**

Trial judge may exclude logically relevant other crimes evidence when probative value of such evidence is substantially outweighed by risk of undue prejudice. Fed.Rules Evid.Rules 401-403, 404(b), 28 U.S.C.A.

2. Criminal Law —369.2(1)

In determining whether probative value of logically relevant other crimes evidence is substantially outweighed by risk of undue prejudice, trial judge must appraise genuine need for challenged evidence and must balance that necessity against risk that information will influence jury to convict on improper grounds. Fed.Rules Evid.Rules 401-403, 404(b), 28 U.S.C.A.

3. Criminal Law —369.2(3)

Although unrelated to extortion scheme, evidence that defendant, as alleged "boss" of organized crime family, had participated in various murders of victims disloyal to crime family was admissible in prosecution for single extortion scheme to establish credibility of Government's disreputable, yet indispensable witnesses, to explain that witnesses had been granted immunity for such murders and dreaded that they were slated for same fate as victims; jury was given limiting instruction on use of such evidence. 18 U.S.C.A. §§ 2, 1951; Fed.Rules Evid.Rules 401-403, 404(b), 28 U.S.C.A.

4. Jury —135

Voir dire is not of constitutional dimension and thus limitation affecting peremptory challenges need not be reviewed with close scrutiny reserved for encroachments on defendant's fundamental rights. U.S.C.A. Const.Amend. 6.

5. Jury —135

Trial court's decision to empanel anonymous jury did not deprive defendant, who was alleged "boss" of organization crime group, of information reasonably necessary to intelligently exercise his peremptory challenges; written questionnaire submitted to panel encompassed broad range of personal demographics and individual voir dire conducted by judge and later by counsel was thorough. U.S.C.A. Const.Amend. 6.

6. Jury —131(10)

Trial judge's explanation to jurors of reasons for using anonymous jury did not infringe on presumption of innocence in trial of defendant, who was alleged "boss" of organization crime group, for conspiracy and extortion; trial judge emphasized that anonymity was intended to protect both prosecution and defense, was not to be interpreted as reflection on defense, that there was no basis for concern that defendant would try to harm any juror, and that procedure was precautionary measure to ensure that no one purporting to represent defendant would to seek to jeopardize defense by making threats in defendant's name. 18 U.S.C.A. §§ 2, 1951; U.S.C.A. Const.Amend. 6.

Robert F. Simone (argued), Harry Lore, Philadelphia, Pa., for appellant Nicodemo Scarfo.

Thomas H. Lee, II (argued), First Asst. U.S. Atty., Edward S.G. Dennis, Jr., U.S. Atty., William B. Carr, Jr., Asst. U.S. Atty., Acting Chief of Appeals, Thomas J. Eicher, Asst. U.S. Atty., Philadelphia, Pa., for appellee U.S.

Before WEIS, GREENBERG and ALDISERT, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.*

Because the prosecution's evidence describing the defendant's organized crime group might have caused anxiety among the jurors, the trial judge withheld their identities before and after voir dire in this extortion case. In these circumstances, we find no abuse of discretion either in

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*At the time of oral argument on this case, the Honorable Joseph F. Weis, Jr. was an active circuit judge. Since that time, Judge Weis has assumed senior status.

adopting that procedure or in explaining it to the jury. We also conclude that other crimes evidence was properly received and that the limiting instructions were appropriate. Accordingly, we will affirm the judgment of conviction.

Defendant Scarfo was convicted of conspiracy and extortion in violation of the Hobbs Act, 18 U.S.C. §§ 2, 1951. He was indicted together with five other persons. Two of his associates pleaded guilty and testified as government witnesses, one was a fugitive, and the charges against two others—Councilman Leland Beloff and his assistant Robert Rego—were served and tried separately.

The evidence at trial permitted the jury to find that Nicodemo Scarfo is the "boss" of the Philadelphia La Cosa Nostra, the organized crime group operating in eastern Pennsylvania and parts of New Jersey. Codefendant Beloff, a Philadelphia city councilman and close friend of Scarfo, cooperated with the group in its illegal activities by corrupting his government office for personal gain. Codefendant Rego, Beloff's administrative aide, also had long standing links with Scarfo's organization.

Beloff and Rego conspired with the Scarfo organization to extort $1 million from a real estate developer, Rouse & Associates, in exchange for Beloff's politically indispensable cooperation in the Penn's Landing redevelopment project on the Philadelphia waterfront. Negotiations between Beloff and representatives from Rouse & Associates were conducted through co-defendant Nicholas Caramandi, a member of the Scarfo organization who later agreed to testify as a government witness.

After the initial contact by Caramandi, the Rouse firm reported the extortion plan to the FBI, which had already placed an informant within the Scarfo organization. As the trial judge assessed the evidence, the remarkable degree of FBI infiltration into the plot permitted the government "to develop virtually conclusive proof of the extortion scheme."

The critical evidence tying defendant Scarfo into the intrigue rested almost exclusively on the testimony of co-defendants Caramandi and Thomas DelGiorno. DelGiorno testified that as a "capo" in Scarfo's group, he and his underlings carried out activities in accordance with instructions received from Scarfo. Among those under DelGiorno's command was Caramandi.

Pretrial proceedings revealed that plea agreements, which included transactional immunity and post-trial witness relocation, had been arranged with Caramandi and DelGiorno in return for their testimony as government witnesses. Both had been implicated in several murders allegedly committed at Scarfo's behest. Their testimony would show that one prospective witness had been killed in the past, one judge had been murdered, and attempts had been made to bribe other judges. Caramandi and DelGiorno's lives had been threatened, and they would remain under heavy guard during their appearances in court.

In view of these unusual circumstances, the trial judge granted the government's motion to empanel an anonymous jury. During voir dire neither party was permitted to learn the jurors' names, residence addresses, or places of employment. However, the prospective jurors completed an extensive written questionnaire which delved into such topics as the nature of their employment, the general neighborhood in which they lived, their age, reading habits, television viewing preferences, education, experience as jurors in previous criminal cases, membership in various organizations, hobbies, and connections to law enforcement agencies. The judge then personally interrogated the prospective jurors, after which he permitted further questioning by counsel.

Before the trial began, the judge told the jurors that they would be selected on an anonymous basis and sequestered. He informed them that they would hear testimony about organized crime, and that he wanted them to consider the

case without any apprehension that they or their families would be endangered. The judge made it clear that, in his lengthy career on the bench, he had not heard of a case where a defendant tried to harm a juror and gave his "personal, strong belief" that there was no basis for such concern in this case.

The judge emphasized that anonymity was intended to protect the interests of both the prosecution and the defense. He explained that the anonymous selection procedure was not to be interpreted as a reflection on the defense, but was being used simply as "a precautionary measure to make sure that both sides get a fair trial." The defendant would want to avoid contact with the jury by someone who, though purporting to represent him, sought instead to jeopardize his defense by making threats in his name.

In the charge to the jury at the conclusion of the trial, the court reiterated that the anonymous selection process had been designed to protect the jurors against the possibility that persons not associated with the proceedings might have tried to "muddy up the waters" or "cause unnecessary worry". Although the judge acknowledged that he had adopted the procedure "to relieve your minds of any anxiety," he repeated his "absolute" belief that "there was never the slightest reality to any such feeling of insecurity." The full text of the instructions to the jury is attached to this opinion as an appendix.

Before trial, the defense requested the court to prohibit the United States Attorney from referring to La Cosa Nostra, the mafia, or evidence of murders. The trial judge denied the motion, reasoning that evidence showing that Caramandi and DelGiorno carried out their instructions to commit other crimes was admissible to establish their subservience to Scarfo.

During the government's case, these two witnesses explained that membership in the Scarfo crime family was

limited to only those who had been "made," that is, to those who had committed a murder. They described the secret initiation ceremony in which each proposed member swore absolute loyalty to the crime family.

Caramandi and DelGiorno detailed the various levels of authority within the organization, its murders, briberies, extortions, and other criminal activities, together with the violence that was used to maintain internal discipline. Members participated in such activities only with the knowledge and consent of their superiors. In the case of homicides, however, prior approval from the crime boss himself was required. Both Caramandi and DelGiorno testified to several assassinations ordered because the victims broke the organization's rules.

These witnesses described Scarfo's knowledge of the Rouse extortion scheme and the necessity that he approve Carmandi's participation in the plot. In addition, they told of Scarfo's several modifications to the division of the anticipated extortion proceeds between his organization and the other participants.

After the jury found him guilty on two counts, defendant moved for a new trial and an acquittal. In denying the motions, the district court commented that evidence of Scarfo's leadership and the grave consequences for conducting unapproved criminal activities were crucial to understanding his role as a co-conspirator. The testimony linking Scarfo to murders unrelated to the Rouse extortion was necessary to explain why Caramandi and DelGiorno had turned government witnesses, despite the likelihood of death or serious injury for breaking faith with the mob.

Although defendant did not object to the witnesses' detailed recitations of their part in various crimes, the trial judge cautioned the jury that the government's evidence was admitted for only limited purposes and that defendant was not on trial for those other offenses. The judge was convinced

that his limiting instructions on the evidence and the anonymous selection procedures were adequate and that "they not only could, but actually did, eliminate the potential for unfair prejudice."

On appeal defendant raises three arguments. First, he contends that the government's evidence of other crimes was conveyed in frightening detail that made it impossible for the jury to analyze the crucial issues dispassionately. Second he argues that the empaneling of an anonymous jury was improper and heightened unnecessarily the atmosphere of prejudice and fear, thus denying a fair trial. Third, he asserts that the indictment charged a single conspiracy but that the government at trial had proved multiple schemes.

I. EVIDENCE OF OTHER CRIMES

[1-3] Federal Rule of Evidence 404(b) generally prohibits the admission into evidence of extrinsic acts intended to prove a defendant's propensity for crime or to suggest to the jury unfavorable inferences reflecting on his character. However, evidence that bears on a relevant issue in the case, though possessing the potential to damage the defendant's cause, is not inadmissible for that reason alone.

As the Supreme Court clarified in *Huddleston v. United States*, ____ U.S. ____, ____, 108 S.Ct. 1496, 1500, 99 L.Ed.2d 771 (1988), Federal Rules of Evidence 401 and 402 embody "the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise." Rule 404(b) is one such rule providing otherwise.

Rule 404(b) is a codification of the common law prohibition against the admission of evidence of prior crimes, wrongs, or other acts relevant solely to prove the defendant's "general criminal predisposition to do wrong." P. Rice, *Evidence: Common Law & Federal Rules of Evidence* 136 (1987). We have said that we will "refuse to admit evidence of prior criminal acts which has no purpose except to infer a

propensity or disposition to commit crime." *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir.1976).

However, if offered for another, proper purpose, the same evidence of other crimes or acts is subject only to the ordinary limitations under Rules 402 and 403. Before admitting evidence of other acts under Rule 404(b), a court therefore must inquire "whether that evidence is probative of a material issue other than character." *Huddleston*, ____ U.S. at ____, 108 S.Ct. at 1499.

Recognizing the risk that unduly prejudicial testimony might be introduced under Rule 404(b), the Supreme Court has listed four guidelines for admissibility under the Rule. First, the other crimes evidence must have a proper purpose. Second, the proffered evidence must be relevant. Third, its probative value must outweigh its potential for unfair prejudice. Fourth, the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted. *Id.* at ____, 108 S.Ct. at 1502.

The drafters contemplated that Rule 404(b) would be construed as a rule of "inclusion" rather than "exclusion". "They intended to emphasize admissibility of 'other crime' evidence." *United States v. Long*, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed. 2d 657 (1978). The possible uses of other crimes evidence listed in the Rule—motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake—are not the only proper ones. *United States v. Simmons*, 679 F.2d 1042, 1050 (3d Cir.1982), *cert. denied*, 462 U.S. 1134, 103 S.Ct. 3117, 77 L.Ed.2d 1370 (1983).

In *Simmons*, evidence of similar criminal activity perpetrated before the period charged in the indictment was admissible to furnish essential background information, to demonstrate a continuing relationship between an unindicted co-conspirator and the defendant, and to assist the jurors in understanding the unindicted co-conspirator's role in the

forgery scheme. *Id. See also United States v. O'Leary*, 739 F.2d 135, 136 (3d Cir.1984) (evidence of other crimes admissible to provide background information, establish parties' familiarity with one another, and prove their concert of action), *cert. denied*, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 776 (1985).

In addition to the Rule 404(b) test, evidence of other crimes must also be evaluated against the unfair prejudice standard of Rule 403. A trial judge, therefore, may exclude logically relevant other crimes evidence if its probative value is substantially outweighed by the risk of undue prejudice. *United States v. Cook*, 538 F.2d 1000, 1003 (3d Cir.1976). In making this determination, the trial judge must appraise the genuine need for the challenged evidence and balance that necessity against the risk that the information will influence the jury to convict on improper grounds. *Id. See United States v. Driggs*, 823 F.2d 52, 54 n. 2 (3d Cir.1987).

We have cautioned that "[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Long*, 574 F.2d at 767. Thus, in *United States v. Dansker*, 537 F.2d 40, 58 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977), we upheld the district judge's discretion in admitting prior crimes evidence which cast light on the relationship between a witness and the defendants. Because the government's case against the defendants rested on the testimony of unindicted co-conspirators, evidence describing their relationship to the defendants and providing background information to illustrate the witnesses' roles in the scheme was properly admitted. *Cf. United States v. Schwartz*, 790 F.2d 1059, 1062 (3d Cir. 1986) (relevance of other crimes evidence found to be "marginal at best"); *United States v. Hans*, 738 F.2d 88, 95 (3d Cir. 1984) (no genuine need to prove defendant's previous association with a bank robber other than to improperly suggest criminal propensity;) *United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir.1978)

(other crimes evidence not admissible to show modus operandi because scheme not unique), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979).

The district judge here commented that evidence of the defendant's participation in various murders would normally be excluded as irrelevant and unduly prejudicial in a trial for a single extortion scheme. However, in view of the unusual circumstances in this case, the judge concluded that such exclusion would be prejudicial to the government.

Caramandi and DelGiorno had extensive criminal backgrounds. The revelation of these histories would necessarily undermine the jury's willingness to believe the witnesses, particularly if the government were barred from full disclosure. The witnesses' unsavory mores were hardly likely to inspire confidence in their truthfulness and, therefore, it was important for the jury to realize that Caramandi and DelGiorno had been granted immunity for the very murders that they asserted Scarfo had ordered. Moreover, Caramandi's belief that he had been threatened by Scarfo and his fear that his daughter's life was in jeopardy were probative of his motives to testify. Similarly, DelGiorno inferred from the conduct of other organization members that he, too, had been marked for death, a realization that prompted him to approach the authorities and arrange for cooperation.

That Scarfo had such tight control over an organization capable of executing those who incurred his displeasure was obviously an essential fact the jury needed to evaluate in considering the extent to which fear swayed the two witnesses. That the witnesses themselves had participated in the slaying of compatriots accused of disloyalty to the crime family tended to give credence to their dread that they were slated for the same fate.

The other crimes history was relevant to the government's case. If accepted by the jury, the testimony was

also damaging to defendant. That impact, however, does not require exclusion here where the evidence was essential in the government's effort to establish the credibility of its disreputable, yet indispensable, witnesses. *Cf. United States v. Rivera*, 837 F.2d 906, 911-13 (10th Cir.1988) (other crimes excluded where government failed to identify its purpose).

The trial judge charged the jury: "Mr. Scarfo is not on trial here for any murders, for any gambling or any other kind of illegal activities. . . . [T]hose kinds of offenses would be dealt with in other tribunals than this. . . . I think you can understand that it would be utterly improper for you to take them into account in this case in the sense of saying to yourselves: 'Well, maybe he didn't do this extortion; but he did a lot of other stuff. So it doesn't much matter whether they prove this case. I am going to find him guilty anyway.' That obviously would be totally improper."

In instructing on the proper use of other crimes evidence, the judge explained that the testimony could be used to assess the nature of the relationship among Caramandi, DelGiorno, and defendant.

> "It is a position of the Government that Caramandi and DelGiorno were subordinates within this carefully organized and structured organization; that they did Mr. Scarfo's bidding; [that] they never would dream of doing anything this large without his approval; and that the tapes and other evidence in the case corroborate their testimony to the effect that he was involved and did approve."

The judge also told the jurors that they could use the evidence to decide whether defendant adopted a standardized scheme or mode of operation, to determine whether he had knowledge of or an intent to participate in the conspiracy, as well as to evaluate the witnesses' motives for cooperating with the government. Finally, the judge stated that the government had the right to reveal the witnesses' unsavory

criminal records "so as not to be accused of trying to hoodwink the jury by pretending that people like Caramandi and DelGiorno were Boy Scouts."

These clear, frank, and comprehensive instructions did all that was possible under the circumstances to place the other crimes evidence in proper perspective. In view of these limiting instructions and our review of this evidence's unique relevancy here, we conclude that the district court did not abuse its broad discretion in permitting the introduction of this testimony.

II. THE ANONYMOUS JURY

[4, 5] The objections to the selection of jurors without disclosure of their names or addresses fall into two categories: one, an impairment of the right to exercise peremptory challenges; and, two, an infringement on the presumption of innocence.

A.

Although not guaranteed by the Constitution, the right to exercise peremptory challenges occupies an important position in our trial procedures. *Batson v. Kentucky*, 476 U.S. 79, 91, 98, 106 S.Ct. 1712, 1720, 1723, 90 L.Ed.2d 69 (1986); *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29, 63 L.Ed. 1154 (1919); *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). This venerable practice has long served a core function in the selection of impartial juries. *Batson*, 476 U.S. at 89 n. 12, 106 S.Ct. at 1718 n. 12.

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (overruled in part by *Batson*,) the Court reviewed the long history of the peremptory challenge, tracing its lineage to early English practice which permitted thirty-five challenges without cause by a criminal defendant and an unlimited number of such challenges by the prosecutor. *Id.* at 212-213, 85 S.Ct. at 831-32. In this country,

Congress first allotted peremptory challenges in 1790. The number allotted to each party has been adjusted from time to time until the current schedule was set in Federal Rule of Criminal Procedure 24(b).

Although approving the practice of challenges without cause, the Court in *Swain* noted the criticism leveled against the procedure because of delay, expense, and the elimination of qualified veniremen. *Id.* at 216 & n. 19, 85 S.Ct. at 833 & n. 19. The extensive, protracted, and nearly unlimited voir dire permitted in some state courts has been subjected to particular attack. *See id.* at 216-17 n. 19, 85 S.Ct. at 814 n. 19. In many instances, the voir dire may last longer than the trial itself and, rather than ensuring the selection of an impartial jury, may produce a biased one. In *Batson*, Justice Marshall interjected a further criticism of the practice, stating that "the racial discrimination that peremptories inject into the jury-selection process" could be cured only by "eliminating peremptory challenges entirely." *Id.* 476 U.S. at 102-03, 106 S.Ct. at 1726. *See* P. Devlin, *Trial By Jury* 32-34 (1956); V. Hans & N. Vidmar, *Judging the Jury* 63-94 (1986).

Because voir dire is not of constitutional dimension, limitations affecting peremptory challenges need not be reviewed with the close scrutiny reserved for encroachments on the fundamental rights of an accused.

In a series of decisions, the Court of Appeals for the Second Circuit upheld the selection of an anonymous jury—one in which the jurors are not required to give their names but are identified only by number. In *United States v. Barnes*, 604 F.2d 121 (2d Cir.1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980), the trial court presided over the prosecution of a notorious narcotics distribution ring. Recounting the sordid history of attempts at witness intimidation and jury tampering in previous cases of that nature, the trial judge barred disclosure of the veniremen's names, addresses, ethnic backgrounds, and religion. *See also*

United States v. Ruggiero, 846 F.2d 117, (2d Cir. 1988). He conducted extensive questioning on other matters, including a prospective juror' county of residence, occupation, education, membership in groups or clubs, and their possible racial prejudice. The judge explained to the jurors that empaneling them anonymously was intended to insulate them from media harassment. *Id.* 604 F.2d at 137.

The Court of Appeals, noting the broad discretion granted a trial court in conducting voir dire, reviewed a number of decisions in which questioning of jurors had been limited or prohibited entirely on such issues as specific addresses, views on obscenities, attitudes toward drug use, and political viewpoints. *Id.* at 139-40. The court rejected the defendant's contention that jurors must "declare their identities and publicly take responsibility for the decisions they are to make." *Id.* at 140. Instead, the court affirmed the seating of an anonymous jury, reasoning that the procedure allayed the jurors' fears of retaliation against themselves and their families and so promoted impartial decision making.

The *Barnes* precedent was followed in *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1995, 99 L.Ed.2d ____ (1988); *Hayden v. United States*, 814 F.2d 888 (2d Cir. 1987); *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 592, 88 L.Ed.2d 572 (1985); *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 474 U.S. 819, 106 S.Ct. 66, 67, 88 L.Ed.2d 54 (1985); and *United States v. Rosado*, 728 F.2d 89 (2d Cir.1984). *Cf. In re Baltimore Sun Co.*, 841 F.2d 74, 76 & n. 5 (4th Cir.1988). The practice of limiting identification of jurors, however, did not originate with *Barnes*. In *Johnson v. United States*, 270 F.2d 721, 724 (9th Cir.1959), *cert. denied*, 362 U.S. 937, 80 S.Ct. 759, 4 L.Ed.2d 751 (1960), the court ruled that the exact address of the jurors could be withheld. *See also Wagner v. United States*, 264 F.2d 524, 527 (9th Cir.), *cert. denied*, 360 U.S. 936, 79 S.Ct. 1459, 3 L.Ed.2d 1548 (1959).

The *Barnes* case and its progeny have been the subject of law review commentary. *See e.g.* , Note, *Anonymous Juries*, 54 Fordham L. Rev. 981 (1986); Case Comment, *Voir Dire Limitations As a Means of Protecting Jurors' Safety and Privacy*, 93 Harv.L.Rev. 782 (1980); Note, *The Peremptory Challenge in a Criminal Case After United States v. Barnes*, 71 J.Crim.L. & Criminology 173 (1980); Comment, *Defendants Are Not Deprived of the Intelligent Use of Peremptories by Voir Dire Restrictions Intended to Protect Potential Jurors' Safety and Privacy*, 55 Notre Dame Law. 281 (1979).

The Supreme Court touched tangentially on the point in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). There, the Court vacated a district judge's decision to both close voir dire to the public and withhold the transcript. The Court recognized that the sensitive facts in the case, involving the rape and murder of a teenage girl, might intrude on the veniremen's privacy. The Court cautioned that this interest must be balanced against the historic need for openness in every phase of the trial process. Yet, the Court suggested that "a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment." *Id.* at 512, 104 S.Ct. at 825.

Although the issue is one of first impression within this circuit, the case law in other forums is helpful. The legal standards articulated by those courts and our review of the record here convinces us that defendant was not deprived of information reasonably necessary to the intelligent exercise of his peremptory challenges. The written questionnaire submitted to the panel encompassed a broad range of personal demographics. Additionally, the individual voir dire conducted by the judge and later by counsel was thorough. There is ample support for the district court's conclusion that "counsel were in a much better position to assess the

suitability of prospective jurors in this case than in most other trials, criminal or civil."

Nor do we quarrel with the court's decision to invoke this unusual procedure. The judge heard testimony during pretrial proceedings that, if believed by the jurors, might well have caused them to be apprehensive—not only for their own safety but, perhaps more acutely, for the safety of their families. In addition, it was not beyond the range of possibility that persons hostile to defendant might have been inclined to harass the jurors. *See United States v. Borelli*, 336 F.2d 376, 392 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). In circumstances similar to those here, we must be particularly deferential to the trial judge, familiar as he is with the local ambience. *See Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981) (trial judge accorded broad discretion in determining best method for conducting voir dire). *See also Thomas*, 757 F.2d at 1365 (anonymous jury appropriate where judge believes jurors need protection and where precautions to minimize effect are taken).

Juror's fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented. *See, e.g., United States v. Grandison*, 783 F.2d 1152, 1155 (4th Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 160, 93 L.Ed.2d 99 (1986); *United States v. Thomas*, 632 F.2d 837, 841 (10th Cir.), *cert. denied*, 449 U.S. 960, 101 S.Ct. 373, 66 L.Ed.2d 227 (1980); *Owens v. Estelle*, 484 F.Supp. 230, 233 (W.D. Tex.1979), *aff'd mem.*, 611 F.2d 880 (5th Cir.1980). No doubt similar reactions in unreported cases have occurred. As judges, we are aware that, even in routine criminal cases, veniremen are often uncomfortable with disclosure of their names and addresses to a defendant. The need for such information in preparing an effective defense is not always self-evident. If, in circumstances like those in *Barnes*, jury anonymity promotes impartial decision making, that result is likely to hold equally true in less celebrated cases.

The virtue of the jury system lies in the random summoning from the community of twelve "indifferent" persons—"not appointed till the hour of trial"—to decide a dispute, and in their subsequent, unencumbered return to their normal pursuits. *See* 3 W. Blackstone, *Commentaries* * 378. The lack of continuity in their service tends to insulate jurors from recrimination for their decisions and to prevent the occasional mistake of one panel from being perpetuated in future deliberations. Because the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept. In short, we believe that the probable merits of the anonymous jury procedure are worthy, not of a presumption of irregularity, but of disinterested appraisal by the courts.

We are mindful that in capital cases, the law requires the disclosure of the names and addresses of prospective jurors three days before trial. *See* 18 U.S.C. § 3432. We, of course, are not confronted with that situation here, and do not address it in this opinion.

The ruling of the district judge to limit voir dire is supported by respectable legal authority and grounded in legitimate concerns for juror safety. We find no abuse of the judge's substantial discretion in taking that measure here.

B.

[6] The defendant, although dissatisfied with the anonymous jury procedure itself, concentrates his strongest fire on the trial judge's explanation to the jurors of the reasons for his action. He asserts that the court's statements caused an impermissible infringement on the presumption of innocence.

The presumption of innocence has been hailed as "undoubted law, axiomatic and elementary," the enforcement of which "lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15

S.Ct. 394, 402, 39 L.Ed. 481 (1895). Yet, it is a doctrine widely misunderstood and often cited erroneously in contexts far removed from the trial itself.

The presumption of innocence allocates to the government in criminal trials the burden to persuade a jury of the defendant's guilt beyond a reasonable doubt. *Taylor v. Kentucky*, 436 U.S. 478, 483-85 & n. 12, 98 S.Ct. 1930, 1933-34 & n. 12, 56 L.Ed.2d 468 (1978); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1080 n. 1 (3d Cir.1976). It acts as an admonition to the jury to determine an accused's guilt or innocence exclusively on proper evidence admitted at trial, and not by inference from any suspicions that may arise from the defendant's arrest, indictment, custody, or other events not introduced into the record. *Bell v. Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861, 1870, 60 L.Ed.2d 447 (1979); *Taylor*, 436 U.S. at 485, 98 S.Ct. at 1934.

The presumption of innocence is "an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effective persuasion.' " *Bell*, 441 U.S. at 533, 99 S.Ct. at 1871. It technically is not a "presumption"—an obligatory inference drawn from a fact admitted into evidence. "Instead, it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence." *Taylor*, 436 U.S. at 484 n. 12, 98 S.Ct. at 1934 n. 12. The misnomer persists because the courts find the phrase useful in impressing upon the jury at trial the importance of the defendant's right to be *proved* guilty. *Id.* at 485, 98 S.Ct. at 1934.

The doctrine has been documented from origins in Deuteronomy, through adoption in the Roman Code, to emergence in the English and American common law. *Coffin*, 156 U.S. at 454-56, 15 S.Ct. at 403. The presumption becomes an important consideration when events during trial create the risk that a juror might decide the case on a basis extraneous from the evidence produced in court. In *Estelle*

v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), for example, the Court disapproved the practice of compelling defendants to appear at trial in identifiable prison uniforms. The practice furthered no essential state policy and presented an "unacceptable risk" of "impermissible factors coming into play" to unconstitutionally influence the jury's deliberations. *Id.* at 505, 96 S.Ct. at 1693.

The Court, however, has not ignored the harsh realities of criminal trials. In *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), the Court decided that the presence of armed, uniformed state troopers in the courtroom was not an infringement on the presumption of innocence. "Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct." *Id.* at 567, 106 S.Ct. at 1345. More dramatically, in *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), the Court conceded that in certain extreme circumstances shackling and gagging may be "the fairest and most reasonable way to handle" a particularly disruptive defendant.

The courts of appeals have recognized that trial judges must have wide discretion in maintaining courtroom security and in protecting their processes from outside interference. *See, e.g., United States v. Garcia*, 625 F.2d 162, 167 (7th Cir.), *cert. denied*, 449 U.S. 923, 101 S.Ct. 325, 66 L.Ed.2d 152 (1980); *United States v. Clardy*, 540 F.2d 439, 443 (9th Cir.), *cert. denied*, 429 U.S. 963, 97 S.Ct. 391, 50 L.Ed.2d 331 (1976); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir.1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976).

The courts have permitted inmate witnesses to be bound in handcuffs and leg irons where precautions are taken to

shield these security measures from the jury's view. *United States v. Amaro*, 816 F.2d 284, 285 (7th Cir.1987); *Wilson v. McCarthy*, 770 F.2d 1482, 1484-85 (9th Cir.1985). The use of metal detectors positioned directly outside the doors of the courtroom in which the defendant is being tried have been approved. *United States v. Carter*, 815 F.2d 1230, 1231-32 (8th Cir.1987); *United States v. Kelly*, 551 F.2d 760, 766 (8th Cir.), *cert. denied*, 433 U.S. 912, 97 S.Ct. 2981, 53 L.Ed.2d 1097 (1977); *United States v. Heck*, 499 F.2d 778, 788 (9th Cir.), *cert. denied*, 419 U.S. 1088, 95 S.Ct. 677, 42 L.Ed.2d 680 (1974). The sequestration of the jury at a naval station has also been upheld. *United States v. Hoffa*, 367 F.2d 698, 711-12 (7th Cir.1966), *vacated on other grounds*, 387 U.S. 231, 87 S.Ct. 1583, 18 L.Ed.2d 738 (1967).

The Court of Appeals for the Second Circuit in *Thomas* distinguished the anonymous jury question from the jail garb case by reasoning that, unlike requiring inmates to appear in prison clothing, "protection of jurors is vital to the functioning of the criminal justice system." *Thomas*, 757 F.2d at 1364. The court wrote: "As a practical matter, we cannot expect jurors to 'take their chances' on what might happen to them as a result of a guilty verdict. . . . Justice requires that when a serious threat reasonably is found to exist, precautionary measures must be taken." *Id.*

In three of the Second Circuit cases we cited above, the trial judges discussed with the jurors the likelihood that their case might receive considerable publicity, explaining that anonymity was being provided to protect them from unwanted media inquiries. *See Ferguson*, 758 F.2d at 854; *Thomas*, 757 F.2d at 1364-65; *Barnes*, 604 F.2d at 137. The process thus was presented as an attempt to ward off those who might otherwise infringe on the jurors' privacy and to shelter them from undesired publicity.

In this case, the trial judge rejected that explanation as improper. He stated that the purported justification was a subterfuge which concealed the actual reason for preserving

anonymity. "In my view, judges must deal honestly with juries, or the entire system will break down." However, "the full and truthful explanation of the reasons for juror anonymity should not cast any adverse reflection upon the defendant beyond that which inevitably, and properly, occurs if the jury accepts as true the government's evidence at trial." As the judge candidly acknowledged, the jury might assume that he had formed some opinion as to the guilt of defendant unless this impermissible assumption was eliminated or greatly minimized by appropriate instructions from the bench. *Cf. Rosado*, 728 F.2d at 94-95.

The same observations also apply to other courtroom security procedures. The presence of armed guards in the courtrooms, the placement of metal detectors just outside the doors, and the sequestering of the factfinders at a secret location inevitably must convey the idea that the trial is something more than a mere academic dispute between lawyers. Doubtless the jurors are aware that the trial judge exercises control over security matters and has approved, if not actually directed, their implementation. Yet we need not labor through an extended discussion to prove that such precautions have not deterred jurors in the past from acquitting defendants when the evidence did not support conviction.

Essentially, trials in criminal cases depend on the intellectual integrity and common sense of those chosen to decide whether the prosecution has met its burden. The constitutional guarantee of trial by jury is premised on the fundamental belief that juries will follow the law, that they will not convict on mere suspicion but will instead require proof beyond a reasonable doubt. *See Richardson v. Marsh*, ____ U.S. ____, ____, 107 S.Ct. 1702, 1706-07, 95 L.Ed.2d 176 (1987). The citizens of this country have placed their faith in the jury system and the courts are obliged to honor that tradition. *See Duncan v. Louisiana*, 391 U.S. 145, 152-54, 88 S.Ct. 1444, 1449-50, 20 L.Ed.2d 491 (1968).

Viewed from this perspective, the trial judge here was correct in his decision to be frank with the jury. It is a mistake to assume that jurors are naive and unfamiliar with the realities of life. The jury is designed to represent a broad, cross-section of the community, selected from among the defendant's peers. *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975); *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940); *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 308, 25 L.Ed. 664 (1879). The very fact that jurors are well acquainted with life in their community is perhaps the most significant reason why faith in the system has continued. *See Apodaca v. Oregon*, 406 U.S. 404, 410, 92 S.Ct. 1628, 1632, 32 L.Ed.2d 184 (1972) (essential feature of jury trial lies in interposing common sense judgment of laymen between accused and accuser.)

Nevertheless, it is interesting to speculate that if the judge had not made a point of discussing anonymity, the jurors might have simply assumed that to be the normal procedure. Those who never before served on a jury could have concluded that identification by number was standard in all criminal cases. The anonymity feature, therefore, is not intrinsically suggestive of any inference of guilt. That is not to say that it would have been appropriate to withhold an explanation here where some of the prospective jurors may well have served on other occasions.

Even assuming that the jurors were influenced by the court's decision to empanel anonymously, the defense's assumption that anti-defendant bias is the only possible, or even the most likely, reaction is suspect. Predicting juror responses to the anonymity practice is pure speculation.[1] A

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[1]Seven jurors in one criminal trial received unsigned letters which read:

"Find these guinea sons of bitches guilty. Don't let them get away with something they did a long time ago. Send them to jail now, all those Mafia bums."

juror who fears a defendant's retaliation might be more apt to return a guilty verdict despite such fears rather than because of them. *See Owens*, 484 F.Supp. at 233. If, however, anonymity dispels apprehension, it serves the ideal of dispassionate judgment.

It is worth observing, too, that after jury selection is concluded, the anonymous selection feature provides no reinforcing reminders of improper or unfavorable inferences. Unlike such continuing security precautions as armed guards and metal detectors, voir dire, once completed, is not repeated.

We have carefully reviewed the instructions given by the trial judge and are persuaded that they were proper in adequately protecting defendant from possible adverse juror inferences.

In sum, we reject the defendant's challenge to the jury selection process employed in this case.

III.

As a final point, defendant contends that there was a variance between the single conspiracy charged in the indictment and what he asserts were multiple conspiracies proved at trial. We find no merit in this contention.

The judgment of the district court will be affirmed.

APPENDIX

At the start of the trial, before the opening speeches of counsel, the court gave the following instructions to the jury:

"Now, there are certain additional comments concerning the manner in which you have been selected and the manner

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(Footnote 1 continued)

United States v. Borelli, 336 F.2d 376, 392 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Several of the jurors interpreted the notes as clever attempts to *discourage* convictions, a meaning precisely opposite to the words the author wrote. *Id.*

in which you are going to be treated throughout this trial. You understand that you will be sequestered. This is not at all unusual. In any case involving a high degree of publicity or a case which is expected to attract a high degree of publicity, we like to keep jurors to themselves and to see to it they do not hear anything on the radio or television about the case. We want and both sides want to make sure when the time comes your verdict is based upon what you hear in the courtroom and not on what somebody may have said in the newspapers.

"This case is a little different from most in that, as you know, you have been selected on an anonymous basis. This is a sort of experimental procedure that we are trying in this case; and the reasons for it, I want to make clear, do not have anything to do with the guilt or innocence of the defendant, but rather that question of his guilty or innocence is something which you as jurors will decide on the basis of the evidence which has been presented.

"As in all cases, the judge has to try to provide a fair trial to both sides; and I have to touch all bases. If this were a civil case where the plaintiff was suing the defendant for damages, I would be required to instruct the jury on how they calculate damages even though I don't know whether they are going to decide in favor of the plaintiff or not. So that I have to take into account all possibilities, and that applies also in deciding how the case should be run.

"I am aware, from what has been stated by government counsel in its pleadings and pretrial presentations and so forth, of the general nature of the evidence which the government will present. It is not up to me to decide—and I have not decided and I express no opinion—as to whether that evidence is true or not true. That is the issue which you as jurors will be required to decide.

"But it is conceivable that you will decide that the government's evidence is correct. And if so, then the nature

of that evidence is such that you might be apprehensive of the possibility of repercussions or anything of that sort, and that somebody might try to interfere with your performance as a juror, or that they might try to interfere with your family, or you might be apprehensive that they would.

"There will be a lot of testimony—whether you accept it or not is up to you—but there will be a lot of testimony concerning organized crime and the activities of people in organized crime. We want to make sure that you are able to reach your verdict in this case without having to concern yourselves about the possibility of any harm or other improper influence on yourself or members of your family.

"I want to emphasize very strongly that this in no way suggests that the defendant would ever have dreamed of interfering with you or your family. I have been a judge now for 27 years, and in all that time I have never heard of a case where any defendant ever tried to cause harm to a juror or a member of the juror's family. But we all watch television. We all read newspapers. We see the Godfather movies. We know the atmosphere which is sometimes portrayed on television and in movies and newspapers. And I wanted to make sure that no member of the jury would worry about it, even though it is my personal, strong belief that there would never have been any basis for any worry or concern even if you accept the government's evidence as correct. And, as I say, that is something which is up to you and not something which I have decided.

"And from the defendant's standpoint, he does not want to be in a position where somebody, in order to cause him harm, might pretend to be representing him and causing threats to the jury. Similarly, he does not want to be exposed to the possibility that some unscrupulous government agent or somebody who thinks they are helping the government might try to create some impression on the part of the jury that the defendant is bringing pressure on them.

"In any high-profile case, we are all subject to crank phone calls and anonymous letters and that sort of thing. We want to protect the defendant as well as the government from any belief on the part of the jury that these communications are coming from the other side. In other words, we don't want the defendant to be characterized as somebody who would be sending anonymous communications to the jury; and we don't want the government to be characterized as somebody who is trying to influence the jury improperly.

"To make a long story short, this is done in order to provide laboratory conditions so that both sides will get a fair trial. It is most emphatically not being done because of any apprehension on the part of the court that you would have been endangered or subject to improper pressures if your names had been disclosed. Your names have not been disclosed to either side, and that is the way we are going to keep it, just to be sure that there is no suggestion on anybody's part of anything improper from either side. Now, having said that—and I may dwell on it a little more fully in the course of the closing comments—but I want to make sure that you understand the fact that you are anonymously selected and are being sequestered is not in any way a reflection upon the defendant or the defense or anybody associated with the defense. It is simply a precautionary measure to make sure that both sides get a fair trial."

The court's charge at the conclusion of the trial included the following:

"I just want to make sure you understand that nothing having to do with your being sequestered has any bearing on the case so far as your verdict in choosing which of the competing arguments to accept.

"The reason that you have been kept anonymous, as I stated earlier, is simply because in view of the nature of some of the evidence and of the witnesses who would be testifying, we wanted to make sure that you would not have any

apprehensions about your safety or the safety of your families or anything else. I repeat what I said earlier, that I can assure you absolutely that there was never the slightest reality to any such feeling of insecurity. In other words, there was never any consideration by this court in deciding that you should be anonymous, that any of the parties to this action would have done anything or caused you any problems.

"We simply wanted to protect you against the possibility that others not associated with the trial might have tried to muddy up the waters, might have tried to cause unnecessary worry, and primarily because we wanted to relieve your minds of any anxiety, even though so far as I am concerned, there would never have been any cause for any genuine anxiety. We wanted to be sure that you would be able to act absolutely free of any such worries.

"And as I told you at the beginning, and I will repeat now, the fact that you have been sequestered and have been kept anonymous does not represent any expression of opinion on that part of the court as to the validity or accuracy of any of the testimony which has been presented. This does not represent a decision that in fact these witnesses for the government are telling the truth, nor, of course, does it state a contrary position. It is simply a totally neutral decision so far as you are concerned."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1490

UNITED STATES OF AMERICA

v.

NICODEMO SCARFO
a/k/a "THE LITTLE GUY,"

Appellant

D.C. Crim. No. 86-00453-04

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, ALDISERT, and WEIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ [Illegible]

Circuit Judge

Dated: JUL 25 1988

APPENDIX C

[FILED JUL 27 1987]

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL
NO. 86-453-4

UNITED STATES OF AMERICA,

v.

NICODEMO SCARFO,

MEMORANDUM AND ORDER

FULLAM, Ch.J. July 27, 1987

The defendant Nicodemo Scarfo was indicted, along with co-defendants Leland Beloff, Robert Rego, Nicholas Caramandi and Thomas DelGiorno, on charges of Hobbs Act extortion and conspiracy. Caramandi and DelGiorno pleaded guilty, and testified against their co-defendants. Messrs. Beloff and Rego sought and were granted a severance, and were tried first, but the jury was unable to agree upon a verdict.[1] The defendant Nicodemo Scarfo was then tried separately, was convicted, and now seeks a judgment of acquittal or a new trial.

The factual background may be briefly summarized. Co-defendant Beloff is an elected member of the Philadelphia City Council, representing the First Councilmanic District. Co-defendant Rego is his legislative assistant. The government's evidence established that the Philadelphia City Council has long followed a custom or practice to the effect that any measure requiring the approval of council concerning matters within a particular councilmanic district must originate with the council representative from that

[1]The jury did acquit both defendants on one count, and Rego on another, but were unable to agree on the major charges. After the Scarfo trial, Beloff and Rego were re-tried, and convicted.

district. That is, no member of City Council will ordinarily introduce an ordinance affecting matters in some other councilman's district, and each district councilman has virtually absolute control over any legislative proposal affecting his or her district.

It was the government's theory that co-defendants Beloff and Rego frequently took advantage of that policy or practice in order to line their own pockets and those of their associates; and that they did so by working closely with the local branch of organized crime (hereinafter referred to as "La Cosa Nostra" or "LCN"). The government's evidence was to the effect that the defendant Nicodemo Scarfo is the duly established leader of LCN in this part of the country; that Beloff was a long-time friend and close associate of Scarfo's, and that, while not a member of LCN himself, he enjoyed a sufficiently close relationship to that organization to be able to call upon it for "muscle" and protection as needed, and that he cooperated with the LCN in criminal activities utilizing his council post. Co-defendant Rego was also shown to have had long-standing links with the LCN.

Beloff and Rego, in cooperation with an LCN member (and co-defendant) Nicholas Caramandi, attempted to extort $1 million from a real estate developer, Rouse & Associates, in exchange for Beloff's support of certain ordinances related to the Penn's Landing project along the Philadelphia waterfront. Because the Rouse firm promptly reported the matter to the FBI and enlisted its aid, and because the FBI had already infiltrated the LCN through an informant named Pastorella, who had been taping pertinent conversations for more than a year, government agents were able to develop virtually conclusive proof of the extortion scheme. But the principal evidence of Scarfo's alleged participation in and control over the project was the testimony of co-defendants Caramandi and DelGiorno, who testified for the government.

In my view, the government's evidence sufficed to enable to the jury properly to conclude beyond a reasonable doubt

that the defendant was indeed guilty. The motion for judgment of acquittal will therefore be denied. I turn now to the various grounds asserted in support of the defendant's motion for a new trial.

TESTIMONY OF CO-DEFENDANTS BELOFF AND REGO

Counsel for the defendant sought to introduce, and have read to the jury, the testimony which co-defendants Beloff and Rego had given at their own, earlier, trial, which ended when the jury was unable to agree upon a verdict. It was recognized by all concerned that this would be permissible if, and only if, Messrs. Beloff and Rego were "unavailable" to testify in person. Accordingly, out of the presence of the jury, Messrs. Beloff and Rego were questioned concerning their willingness to testify, and both exercised their Fifth Amendment right not to testify. Thereafter, defense counsel was permitted to have the previous testimony of these witnesses read to the jury.

Before the testimony was read, I gave the following explanation to the jury:

> "THE COURT: Members of the jury, the indictment in this case charges three persons—the defendant Nicodemo Scarfo and two co-defendants, Leland Beloff and Robert Rego.
>
> "A trial of Beloff and Rego occurred earlier. It was not completed for reasons having nothing to do with the guilt or innocence of any of the parties, and they face retrial.
>
> "However, they did testify at their former trial; and counsel for the defendant Scarfo now wishes to read to you relevant portions of the testimony which they gave at their former trial.

"By way of explanation, since they are awaiting retrial, they cannot be required to testify on behalf of either the defendant or the government. Neither the government nor the defendant could force them to testify. But under our rules, because they did testify previously, their earlier testimony may be read.

"You understand, of course, the person reading the testimony is not the witness but is simply reading what the witness said on a previous occasion.

"You may proceed."

Defense counsel did not then—and, as I understand it, does not now—object to these instructions. But it is contended that the defendant is entitled to a new trial because of a further reference to this subject in the course of instructing the jury, at the close of the case, on matters affecting their assessment of the credibility of testimony. After mentioning the factor of witness-demeanor as a clue to credibility, I further instructed the jury as follows:

"To the extent that a witness has not appeared in court, that is not possible—in the case, for example, of the testimony of Councilman Beloff and Robert Rego. Their testimony was read to you. You didn't observe their demeanor. That is through no fault of either side. But they have the right not to testify, and they availed themselves of that right. Therefore, you have to go by what they said. And you would size up the credibility of that testimony pretty much by its internal persuasiveness and by whether it is or is not consistent with other evidence in the case that you accept as correct."

Defendant contends that this instruction indirectly informed the jury that Messrs. Beloff and Rego had exercised their Fifth Amendment right not to incriminate themselves, and

that this unduly prejudiced the defendant. I perceive no merit in these contentions.

In the first place, there was no mention of the privilege against self-incrimination, or of the Fifth Amendment, and it seems unlikely that the jury would have drawn that inference: the jury was merely told that, because both Beloff and Rego were awaiting trial, neither the government nor the defendant could require them to testify, and that, under our rules, this meant that their previous testimony could be read to the jury without their personal appearance on the stand. In the second place, both Beloff and Rego had testified that they were innocent of these charges; their testimony, if accepted, exonerated all three defendants. The jury was thus plainly aware that their testimony did not purport to incriminate them or any other defendant. And finally, even if the jury had been expressly told that Beloff and Rego had asserted their Fifth Amendment privilege, I fail to see any significant prejudice to this defendant: the principal thrust of Scarfo's defense was that he had nothing to do with whatever extortion either Beloff or Rego may have been involved in. A recurrent theme of defense counsel's closing argument was the contrast between the quantity of wiretap and other evidence implicating Rego and Beloff, on the one hand, and the (asserted) virtual absence of evidence implicating Scarfo, on the other.

To summarize, a defendant as to whom the guilt or innocence of co-defendants is of little or no consequence (insofar as his theory of defense is concerned) is not entitled to a new trial because, although he was permitted to read to the jury the exculpatory testimony of his co-defendants, he believes the jury may have formed the impression that the co-defendants' unwillingness to testify in person was based upon their exercise of Fifth Amendment rights. In fact, the jury was accurately instructed, in a neutral fashion, as to why the testimony was being read rather than delivered in person. And it was, I believe, both necessary and

permissible to comment upon the special problems associated with assessing the credibility of deposition testimony.

EVIDENCE OF OTHER CRIMES

The principal argument advanced by the defendant is that his trial was rendered fundamentally unfair by the improper introduction of evidence of his alleged involvement in crimes other than those charged in the indictment. The government did present a great deal of evidence of other crimes—including specific evidence of murders allegedly committed at the defendant's direction. Given the fact that the defendant was being tried only for his alleged participation in a single extortion scheme under the Hobbs Act, the likelihood that evidence of his participation in murders and other mob-related activities over a period of several years would be irrelevant under Federal Rule of Evidence 404(b)—or that, even if technically relevant, it would be excludable, on balance, pursuant to Federal Rule of Evidence 403—seems strong indeed. In the unusual circumstances of this case, however, I concluded that it would be prejudicially unfair to the government to exclude this evidence.

Analysis begins with the observation that the government in a criminal trial is entitled to prove its case. Evidence which is essential to the government's proofs, or evidence without which the balance of the government's evidence would make little or no sense, is admissible under Rule 404 and should not be excluded under Rule 403. In the present case, evidence of defendant's leadership role in La Cosa Nostra was crucial to the government's case. Caramandi and DelGiorno testified that they were members of LCN, that the defendant was their boss, that they were strictly required by the rules of that organization to obtain the defendant's approval before engaging in any substantial criminal activity, and that the defendant authorized the Rouse extortion attempt, and specified the division of the proceeds. There was ample corroboration of Caramandi's participation

in the extortion scheme—in the form of electronic surveillance, for example—but the hierarchical structure of LCN was such that there was, essentially, only the testimony of Caramandi and DelGiorno to implicate the defendant. Their testimony that the defendant was indeed involved would have been virtually inexplicable, if removed from its LCN context. Thus, it was clear that evidence concerning the defendant's leadership role in the LCN was highly probative, and could not be excluded.

The foregoing reasoning does not, of course, suffice to justify permitting the government to introduce evidence concerning the defendant's alleged involvement in various murders—although it can perhaps be argued that once the jury was told the defendant was the leader of the LCN in this area, the evidence concerning specific murders did not have as much additional prejudical impact as might otherwise have been expected. But there were additional reasons supporting the admissibility of the murder evidence.

The testimony of Caramandi and DelGiorno was, as mentioned above, crucial to the government's case. Both had extensive criminal backgrounds. For the government to have presented their testimony without disclosing to the jury their many character flaws would have been misleading, and subject to valid criticism. It was entirely appropriate for the government to bring out, on direct examination, the sordid details; to permit these disclosures only upon cross-examination by defense counsel would have been unfair to the government. Moreover, both witnesses were testifying under plea agreements including sweeping grants of transactional immunity. By cooperating with the government, both men were avoiding prosecution for a host of serious crimes, including, as to each of them, several murders. Here again, I believe the government was entitled to lay before the jury the full extent of these plea arrangements. Thus, evidence of Caramandi's and DelGiorno's participation in murders, as well as other crimes, was admissible.

If it was appropriate to permit the government to show that Caramandi and DelGiorno had committed murders—as, for the reasons outlined above, I believe it was—the fact that it was the defendant who ordered them to commit the murders was, in my view, equally admissible, for several reasons. In the first place, to have withheld from the jury the defendant's involvement in the very murders which adversely affected the credibility of Caramando and DelGiorno would have improperly distorted the jury's view of this credibility factor. In the second place, it seemed appropriate to permit the jury, in assessing the impact of the grant of immunity to Caramandi and DelGiorno, to know that they were accusing the defendant of involvement in the very murders for which they had been granted immunity.

In addition to these considerations, a separate line of reasoning supported admissibility of the murder evidence. The murders were allegedly committed because the victims had in some way violated LCN rules or otherwise incurred the defendant's displeasure. This evidence therefore both explained the rigid discipline which allegedly characterized the LCN—thus strongly corroborating the testimony of Caramandi and DelGiorno concerning the defendant's involvement in the Rouse extortion—and provided substantial additional support for the witnesses' explanations of why they were cooperating with the government (both claimed to have learned, from unimpeachable sources, that they were in imminent peril of suffering a similar fate).

All in all, I remain persuaded that the jury could not be expected to determine accurately the facts of the crimes charged in the indictment without a full disclosure of the relationships among Caramandi, DelGiorno and the defendant, and the LCN organization, and the pertinent ramifications of those relationships.

One final point merits discussion. The only actual trial ruling on this subject which was adverse to the defendant was my refusal to preclude the government from referring

to the LCN, the Mafia, and the murder evidence, in the course of the United States Attorney's opening speech. At no time did I preclude defense counsel from objecting to specific items of evidence on these subjects—indeed, fairly early in the trial, I informed counsel of my surprise at the absence of defense objections, explained that my ruling concerning the opening speech did not permit development of the specific facts of the various murders, and cautioned against undue emphasis on those matters. So far as I am aware, no specific objection to any of this evidence was expressed by defense counsel in the course of the trial. Thus, the only issue preserved for review is the correctness of the court's general ruling refusing to totally preclude the government from presenting the evidence of murders and other crimes.

It is, I understand, conceded that the court properly instructed the jury as to the limited utility of this evidence, and sought to minimize its potential for unfair prejudice. The charge included the following:

> "And it is because of the nature of the association charged, the nature of the relationship among the parties charged by the government, that you have heard a great deal of evidence relating to other kinds of crimes which have no direct bearing upon your verdict in this case.
>
> "I want to make it very clear that Mr. Scarfo is not on trial here for any murders, for any gambling or any other kind of illegal activities that may have been mentioned in the course of the testimony. If there is evidence, and if people wish to charge him with those offenses, those kinds of offenses would be dealt with in other tribunals than this. And neither you nor I can concern ourselves with whether such charges will be brought, whether they have been brought, whether they are pending, what the outcome may be or anything else. That

is for other trials and other courtrooms to determine.

"And I think you can understand that it would be utterly improper for you to take them into account in this case in the sense of saying to yourselves: 'Well, maybe he didn't do this extortion; but he did a lot of other stuff. So it doesn't much matter whether they prove this case. I am going to find him guilty anyway.' That obviously would be totally improper. If he has been shown to be guilty of other crimes, he can be punished for those other crimes in some other tribunal but not here.

"Similarly, it would be improper for him to be in effect punished twice, once for what he did do and once for what he didn't do because he is going to be punished somewhere else for what he did do.

"So that all I am trying to get across to you is that you should not allow the evidence of other crimes which has been presented to you—whether you accept it or not—you should not allow it to affect your evaluation of the evidence concerning Mr. Scarfo's participation in this particular conspiracy.

* * *

". . .I want to make very emphatic that you are not to develop any emotional feelings one way or the other, any prejudice against anybody because of all this evidence of extraneous crimes. To the extent that it tends to establish as a logical, rational matter that the defendant is guilty of the crime charged in this indictment, then you may consider it. But you do not consider it in any other way."

I conclude that the defendant is not entitled to a new trial because of the admission of evidence of other crimes.

—

ANONYMOUS JURY

The jury was sequestered throughout the trial, and the identities of the jurors were not disclosed to anyone, including the trial participants. The defendant did not object to sequestration of the jury, but did object to both the anonymity of the jury and the explanation given to the jury for that procedure.

In a series of cases in the Second Circuit, the practice of preserving the anonymity of jurors in high-profile criminal cases—principally, if not exclusively, those involving organized crime figures—has gained acceptance. *See, e.g., U.S. v. Barnes*, 604 F.2d 121 (2d Cir. 1979); *U.S. v. Thomas*, 757 F.2d 1359 (2d Cir. 1985); *U.S. v. Ferguson*, 758 F.2d 843 (2d Cir. 1985). So far as I am aware, however, this was the first such trial in this Circuit.

The desirability of preserving the jurors' anonymity, given the unusual circumstances of this particular prosecution, seems self-evident. The defendant was alleged to be the head of organized crime in this part of the country. The government's star witnesses, under heavy guard in view of threats upon their lives, would testify that they had personally committed several murders at the direct order of the defendant. There would also be evidence of murders committed to silence witnesses, attempts to bribe judges, etc., etc. To achieve a fair trial for both sides, it was important that the jurors be enabled to function without worrying about their own or their families' safety or the possibility of post-trial repercussions. It was equally important to preserve the jurors from outside influences, not only from persons associated either with the prosecution or the defense, but also from persons who might falsely pretend to be associated with one side or the other, as well as from the cranks and crazies who tend to surface in connection with high-profile trials. Merely sequestering the jury for the duration of the trial would not protect the jurors' families from harassment, or the jurors from distracting worry about such matters.

There are, however, weighty reasons for disclosing the jurors' identities, at least to the parties and their counsel. Preserving anonymity can, at least in theory, deprive counsel of information essential to the intelligent exercise of peremptory challenges; and the very fact of anonymity may constitute a subtle or not-so-subtle suggestion that the defendant is a dangerous person, or that a verdict of guilty is anticipated.

In the present case, there has been no suggestion or argument that the defendant or his counsel were hampered in their efforts to select an impartial jury. Each prospective juror filled out an elaborate questionnaire—a questionnaire which, incidentally, was proposed by defense counsel. There was court-conducted individual voir dire of prospective jurors, followed by unrestricted questioning by counsel. I am entirely satisfied that counsel were in a much better position to assess the suitability of prospective jurors in this case than in most other trials, criminal or civil.

The second argument against the use of the anonymous jury—its potential for destroying the presumption of innocence—is more substantial. The question is whether the risk of unfair prejudice can be eliminated through proper jury instructions; and, if so, whether the instructions given in this case achieved that result. Defendant argues that no form of cautionary instruction to the jury suffices to neutralize the prejudice; and that, in any event, it was error to depart from the instruction which has been approved by the Second Circuit Court of Appeals.

In the Second Circuit cases cited above, the appellate court approved a form of instruction which told the jury that their identities were being kept confidential so that they would not be badgered by representatives of the media. While there is perhaps a grain of truth in that explanation, that plainly is not the true reason for preserving anonymity, and I declined to adopt that subterfuge. In my view, judges must

deal honestly with juries, or the entire system will break down.

Stated otherwise, it was and is my firm conviction that the benefits of preserving jurors' anonymity come at too high a price if it is deemed necessary to misinform the jury in the process. Moreoever, most jurors would undoubtedly see through the transparent subterfuge of invoking media harassment to justify anonymity, would speculate apprehensively about the reasons for the fabrication, and would thus be more likely to draw inferences prejudicial to the defendant than if the real reasons had been given in the first place.

In actuality, however, the full and truthful explanation of the reasons for juror anonymity should not cast any adverse reflection upon the defendant beyond that which inevitably, and properly, occurs if the jury accepts as true the government's evidence at trial. And the only real threat to a fair trial from the fact of anonymity is that the jury might conclude that the judge was already convinced of the truth of the government's evidence, and that risk can, in my view, readily be dispelled through appropriate instructions.

I have set forth in an appendix to this Opinion the pertinent excerpts from the instructions given to the jury at the start of the trial, and in the course of the court's charge as the trial drew to a close. I am convinced that these instructions were appropriate, and that they not only could, but actually did, eliminate the potetial for unfair prejudice.

Defendant's motion for a new trial will be denied.